Supreme Court, U.S.
FILED
JUN 8 2000
CLERK

(5)

No. 99-1641

IN THE

Supreme Court of the United States

U S WEST COMMUNICATIONS, INC.,
Petitioner,

v.

MFS INTELENET, INC., *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

REPLY BRIEF OF PETITIONER

PHILLIP L. DOUGLASS
U S WEST COMMUNICATIONS, INC.
1801 California Street
51st Floor
Denver, CO 80202
(303) 672-2900

WILLIAM T. LAKE
Counsel of Record
JONATHAN J. FRANKEL
CAROL J. BANTA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Petitioner U S WEST Communications, Inc.

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RULE 29.6 STATEMENT

Pursuant to Supreme Court Rule 29.6, petitioner advises the Court that the Rule 29.6 statement filed with its petition for a writ of certiorari is still complete and accurate.

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INTRODUCTION

In its petition for certiorari, U S WEST Communications, Inc. ("U S WEST") demonstrated that the Ninth Circuit acted unlawfully by usurping the Eighth Circuit's exclusive jurisdiction under the Hobbs Act to determine the validity of certain Federal Communications Commission ("FCC") rules. In the case under review, the Ninth Circuit upheld a state regulator's arbitral decision imposing obligations on U S WEST based on FCC rules that the Eighth Circuit had vacated on direct review, simply because the Ninth Circuit believed that its sister court's vacation of those rules was erroneous. U S WEST demonstrated that certiorari is warranted both to vindicate the Eighth Circuit's jurisdiction

and to reestablish the principle that state commissions are bound to follow the federal courts' authoritative pronouncements on the FCC rules implementing the Telecommunications Act.

Rather than focus their attacks on the merits, respondents Washington Utilities & Transportation Commission ("WUTC") and MFS Intelenet, Inc. ("MFS")[1] largely attempt misdirection. First, they contend that the regulatory provision in question — which requires U S WEST to combine any network elements that MFS desires in whatever configurations MFS wants — was voluntarily agreed to by U S WEST, and thus cannot be challenged on federal court review. But U S WEST demonstrated to the satisfaction of both the district court and the Ninth Circuit that the particular combination duty that resulted from the WUTC's arbitration went well beyond anything to which U S WEST had voluntarily agreed in the preceding negotiations, and both courts properly analyzed this obligation as an arbitrated decision rather than a negotiated one. Both courts below rejected the respondents' suggestion that they were powerless to review the arbitral decision in question, and this Court should do the same.

MFS also incorrectly suggests that the issues presented by this case are the result of an "idiosyncratic" procedural circumstances that will never arise again. *See* MFS Opp. at 14-15. To the contrary, they already have, and they will do so repeatedly unless this Court intervenes. Under the Telecommunications Act's "surpassing strange" dual jurisdictional scheme,[2] state regulators are constantly implementing FCC rules, and the question whether states are bound to follow the authoritative determination with respect to those rules by a Hobbs Act court will arise again and again. Indeed, the WUTC states outright in its opposition

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[1] MCI WORLDCOM Communications, Inc. is the successor-in-interest to MFS.

[2] *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366, 378 n.6 (1999).

that it believes it is under no obligation at all to follow FCC rules or federal court decisions on those rules when arbitrating future disputes — a veritable announcement that the agency intends to precipitate the very kinds of conflicts about which the Court should be concerned. *See* WUTC Opp. at 23-24.

On the merits, respondents make the strange suggestion that when the Eighth Circuit vacated as contrary to the Act the only legal authority on which the WUTC's decision was grounded, the court's ruling had no binding substantive effect; rather, it simply created a legal vacuum that freed the WUTC to impose (and the Ninth Circuit to ratify) the self-same obligations that the Eighth Circuit had held unlawful. But the Hobbs Act does not bar only collateral attempts to *invalidate* rules — it also bars attempts to *reinstate* those rules. A determination on direct review that an FCC rule is substantively ***un***lawful under the Telecommunications Act is just as binding as a determination that a rule is lawful. The Hobbs Act court's determination is not merely an interpretation of the statute that other courts are free to ignore; it binds both the state regulators who are obligated to follow FCC rules, *see* 47 U.S.C. § 252(c)(1), and the federal district courts that review the states' actions to ensure that they "hew" to federal law.[3] This is the heart of the error below: The Ninth Circuit allowed the state regulators to impose a requirement on U S WEST in the name of federal law that the FCC itself could not have lawfully ordered because the Hobbs Act court held it to violate the Telecommunications Act.

ARGUMENT

1. Respondents' contention that U S WEST voluntarily agreed to the challenged reconfiguration requirement is nothing but smoke and mirrors — a factual contention that

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[3] *Iowa Utils. Bd.*, 525 U.S. at 378 n.6.

has already been twice rejected by the courts below and that has no place here. U S WEST demonstrated below that a separate disputed provision of the interconnection agreement that the WUTC arbitrator had rejected was a necessary limitation on the obligations that U S WEST and MFS had voluntarily negotiated. *See* MFS Opp. at 10a; Reply App. at 1a-2a, 7a. U S WEST had agreed to combine unbundled elements for MFS contingent upon (and only contingent upon) the exclusion of certain network elements — loops and switches — from that obligation. By removing that exclusion during the arbitration and permitting MFS to demand combinations that *included* these elements, the WUTC imposed a combination duty going well beyond the one to which U S WEST agreed, and U S WEST appropriately challenged the resulting obligation in court. *See, e.g.*, MFS App. at 7a, 10a. Although both respondents tried to avoid judicial review of the resulting element combination duty by claiming that U S WEST had voluntarily agreed to it, both courts below properly analyzed the challenged provision as a state-imposed requirement, applying the legal standard for review of an arbitrated requirement, *see* 47 U.S.C. § 252(e)(2)(B), rather than that for a voluntarily negotiated provision, *id.* § 252(e)(2)(A). *See also* Pet. App. at 12a-13a, 28a. Respondents strain mightily to find "allusions" in the courts' opinions suggesting that either court accepted their view,[4] but there are

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[4] For example, the WUTC asserts: "The district court *alluded* to the fact that the combination provision was negotiated when it held that the Eighth Circuit was concerned with 'compelled recombination.'" WUTC Opp. at 21 n.18 (emphasis added); *see also id.* at 10. But the district court distinguished the Eighth Circuit's reasoning on other grounds (related to cost arbitrage concerns) and used "compelled recombination" merely to refer to the FCC reconfiguration rule at issue here. *See* Pet. App. 28a-29a. MFS's reading of the Ninth Circuit's opinion is similarly imaginative: "*Presumably* because it concluded that the provision met even [the standard of review applicable to arbitrated provisions], the court did not discuss whether or not the combinations provision was negotiated." MFS Opp. at 12 n.11 (emphasis added). These allusions

none: both courts below accepted that they were reviewing an arbitrated provision. This twice-failed factual argument merits no further consideration.[5]

2. U S WEST's argument in this case does not depend on "highly idiosyncratic" or "unique" procedural circumstances. *Cf.* MFS Opp. at 14. MFS suggests that the issues presented in this case arise only because the Eighth Circuit happens to be conducting further proceedings after remand from this Court, and it is rare that the Hobbs Act court will be exercising continuing authority over a case when a later appeals court rules. *See* MFS Opp. at 14-15. But the Ninth Circuit's violation of the Hobbs Act stands

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and presumptions are entirely respondents' inventions. The courts below did not discuss respondents' contentions that U S WEST voluntarily agreed to the obligation at issue because they were meritless.

[5] The WUTC also argues that certiorari is not warranted because U S WEST "may renegotiate its agreement with MFS at any time and therefore avoid any recombination duty in the future." WUTC Opp. at 24. But the interconnection agreement is already in effect; the possibility that future events might (or might not) eliminate the challenged requirement cannot affect the appropriateness of review.

Furthermore, the WUTC asserts that it can impose the same combination requirement in arbitration. *See* WUTC Opp. at 23. In fact, it states that it *has* imposed this requirement "as a matter of state law" in other arbitrations. *Id.* Therefore, even if U S WEST attempted to renegotiate the agreement to remove that obligation, interconnecting carriers would have no incentive to agree, knowing that they could force the issue into arbitration and have the WUTC impose the combination duty by regulatory fiat. And the fact that the WUTC continues to impose a combination requirement despite the Eighth Circuit's invalidation of that requirement demonstrates the need for this Court to reaffirm the primacy of federal law and FCC regulations under the Act.

Finally, other interconnecting carriers may attempt to demand that the same combination requirement be included in their agreements under the Act's "most favored nation" provision. *See* 47 U.S.C. § 252(i) ("A local exchange carrier shall make available any interconnection, service, or network element provided under an agreement approved under this section to which it is a party to any other requesting telecommunications carrier upon the same terms and conditions as those provided in the agreement.").

independently of those circumstances, "unique" or not. Even if there had been no appeal to this Court or further proceedings on remand, the Ninth Circuit would still have been wrong to second-guess the Eighth Circuit's original decision to invalidate the FCC reconfiguration rules on direct review.[6] The fact that the Eighth Circuit happens to be in the midst of considering the very question on which the Ninth Circuit usurped its authority only makes the Ninth Circuit's transgression that much more egregious. The basic error, however, is the same.

Far from being anomalies, the sorts of collisions between state regulators and federal courts presented by this case will actually be quite common under the Telecommunications Act's "surpassing strange" jurisdictional scheme. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. The Act relies on state utilities regulators to implement FCC regulations, subject to federal court review for compliance with the Act and those regulations. *See* Pet. at 3-4. It is virtually certain that state commissions will be implementing FCC rules (and that federal district courts will be reviewing those implementations under 47 U.S.C. § 252(e)(6)) at the very same time that the underlying FCC rules are on direct review in the courts of appeals.

Indeed, it has already happened, and in the very same state. In *MCI Telecomms. Corp. v. U S WEST Communications, Inc.*, 204 F.3d 1262 (9th Cir. 2000), and

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[6] Indeed, under the Hobbs Act, it is *never* appropriate to address an FCC rule's validity in the context of § 252(e)(6) review. The Hobbs Act limits review of a rule's validity to a direct proceeding before a circuit court. 28 U.S.C. §§ 2342(1), 2344. Moreover, as the Fourth Circuit correctly noted, "[t]he FCC is not a party to a § 252(e)(6) action, and surely Congress would not give a court the power to determine the validity of an agency's rules when the agency itself is not a party." *GTE South, Inc. v. Morrison*, 199 F.3d 733, 743 (4th Cir. 1999). *See also City of Peoria v. General Elec. Cablevision Corp.*, 690 F.2d 116, 119 (7th Cir. 1982) (FCC should be defendant in suit to determine validity of FCC rule).

two companion decisions,[7] the Ninth Circuit considered a WUTC arbitral decision ordering U S WEST to place its competitors' equipment on its own premises, based on FCC rules imposing an identical collocation requirement that were simultaneously being challenged on direct review in the D.C. Circuit. *See* 204 F.3d at 1269. Shortly after the Ninth Circuit upheld the WUTC's decision, the D.C. Circuit invalidated the FCC collocation rules on which the WUTC's order was based. *See GTE Serv. Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000). The Ninth Circuit denied rehearing to consider the effect of the Hobbs Act court's determination. *MCI*, 204 F.3d 1262, *reh'g denied* (May 8, 2000). As a result, even though the FCC's collocation standard has been ruled unlawful by the only court with jurisdiction to make that determination, the Ninth Circuit has given the WUTC a pass to impose the exact same regulatory obligations that the D.C. Circuit held unlawful. This situation clearly illustrates that, with states trying to implement FCC rules at the very same time that those rules are under direct review, the chances of a future collision are very high indeed.

Moreover, the WUTC's own arguments suggest not only that similar collisions are likely to arise, but that the WUTC itself has every intention of precipitating them. Remarkably, the WUTC asserts outright that, even if a Hobbs Act court held that the FCC would violate the Act if it imposed certain regulatory obligations on carriers, the *WUTC* could still impose the exact same obligations; in its view, a Hobbs Act court's decision vacating an FCC rule "would simply mean that there is no FCC rule" (WUTC. Opp. at 16), and the WUTC could (it says) simply step in and supply the same requirement that the FCC could not. *See also* WUTC Opp. at

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[7] *See also U S WEST Communications, Inc. v. AT&T Communications of the Pac. Northwest, Inc.*, Nos. 98-35789, 98-35828, 98-35829, 2000 WL 249692 (9th Cir. Mar. 3, 2000), *reh'g denied* (May 8, 2000); *U S WEST Communications, Inc. v. Sprint Communications Co.*, Nos. 98-35821, 98-35823, 2000 WL 249696 (9th Cir. Mar. 3, 2000), *reh'g denied* (May 8, 2000).

23-24.[8] Given that the WUTC is effectively claiming the power to revive FCC rules in substance after their invalidation by a Hobbs Act court, the possibility that these issues will arise again is substantial.

3. Respondents erroneously contend that the Eighth Circuit's invalidation of the FCC's reconfiguration rules merely left an *absence* of regulation that the Ninth Circuit was free to fill however it chose, based on its rereading, *ab initio*, of the Act. *See, e.g.*, WUTC Opp. at 18 ("Because of the continued invalidity of the FCC's combination rule, *there currently is no binding FCC rule* that would require or prohibit [reconfiguration] . . . .") (emphasis added).[9] In respondents' view, the court below was free to interpret the Telecommunications Act for itself, unbound by the Eighth Circuit's determination that a reconfiguration requirement was inconsistent with the Act. *See* WUTC Opp. at 16-20; MFS Opp. at 14-18.

But the determination of a rule's validity on Hobbs Act review is not a one-way street — a court's determination that a rule is ***in***valid because it is unlawful under the governing

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[8] Of course, despite the WUTC's contention that it *could* have imposed the reconfiguration requirement as a matter of state law (an assumption that U S WEST would dispute), WUTC Opp. at 23, the WUTC in fact did *not* invoke any state law in imposing that requirement in this case; the arbitrator cited no authority for the network element obligations other than the FCC rules. Pet. App. at 55a-57a; *see also* Pet. at 14. Therefore, the WUTC's suggestion that the provision may be affirmed based on state law is a red herring.

[9] *See also id.* at 13 ("The invalidation of Rules 315(c)-(f) *simply left no rule in place* requiring incumbent carriers to combine elements.") (emphasis added); *id.* at 16 ("[A] decision by the Eighth Circuit [affirming the invalidation] would simply mean that there is no FCC rule that would require [reconfiguration] . . . it would not mean that the combination provision . . . violates the Act."); MFS Opp. at 17 ("As a result of [the Eighth Circuit] decision, *no relevant FCC rules are in place*. Unless and until the Eighth Circuit reinstates the suspended rules, courts have returned to the world that existed *before* the FCC promulgated the challenged provisions.") (first emphasis added).

statute is no less binding than a determination that the rule is valid. Rather than return the legal landscape to square one, the invalidation of an FCC rule as contrary to the Telecommunications Act must preclude other courts from effectively reinstating that same requirement. Otherwise, the Hobbs Act would confer a circuit court's exclusive jurisdiction only to affirm agency orders, but not to *reject* them; other courts would have free rein to second-guess the reviewing court's analysis and to revive invalidated rules.

The WUTC contends that the court below did not violate the Hobbs Act because it did not "invalidate or vacate" FCC rules, two things that the Hobbs Act prevents. WUTC Opp. at 13-14. But by its plain text, the Hobbs Act also precluded the Ninth Circuit from "determin[ing] the validity of" FCC rules. 28 U.S.C. § 2342 (granting "exclusive jurisdiction to enjoin, set aside, suspend (in whole or in part), *or to determine the validity of*" final FCC orders to a single court on direct review) (emphasis added). And that is what the Ninth Circuit did; it declared outright that "the Supreme Court opinion [in *Iowa Utilities Board*] undermined the Eighth Circuit's rationale for invalidating this regulation." Pet. App. at 13a. Even if the Ninth Circuit did not formally reinstate the reconfiguration rules, the "practical effect" of its holding — upholding an identical reconfiguration requirement that was imposed by a state regulator acting on no authority *other than* those rules — is no different than if the court had actually reinstated the rules. *See Southwestern Bell Tel. Co. v. Arkansas Pub. Serv. Comm'n*, 738 F.2d 901, 906 (8th Cir. 1984) (where "practical effect . . . involves a determination of [a rule's] validity," Hobbs Act applies), *vacated on unrelated grounds*, 476 U.S. 1167 (1986); *accord FCC v. ITT World Communications, Inc.*, 466 U.S. 463, 468 (1984) (Hobbs Act applied because issue was same "[i]n substance" as validity determination).

The primacy of the Hobbs Act court's determination of a rule's ***in***validity is particularly vital in the context of the

Telecommunications Act. State regulators are charged with implementing federal law and policy, but are not simply "allowed to do their own thing"; this Court has recognized that they "must hew" to the lines drawn by the FCC and federal courts. *Iowa Utils. Bd.*, 525 U.S. at 378 n.6. *See also* Pet. at 3-4, 16-17. Since state regulators (and reviewing courts) are bound to conform to FCC rules deemed valid on direct review, *see* 47 U.S.C. § 252(c)(1), they must also be bound by a determination that those rules are substantively unlawful. The Court should grant certiorari to make this symmetry crystal clear.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

PHILLIP L. DOUGLASS
U S WEST
COMMUNICATIONS, INC.
1801 California Street
51st Floor
Denver, CO 80202
(303) 672-2900

WILLIAM T. LAKE
Counsel of Record
JONATHAN J. FRANKEL
CAROL J. BANTA
WILMER, CUTLER & PICKERING
2445 M Street, N.W.
Washington, D.C. 20037
(202) 663-6000

Counsel for Petitioner
U S WEST Communications, Inc.